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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 615

WILLIAM HENNING RUBIN, MORTON H. BERNSTEIN, JOHN E. KELLY, SR., AND LILLIAN M. KELLY, HIS WIFE; JOHN E. KELLY, JR., AND CHARLES TURNER,

Petitioners,

vs.

CHICAGO SOUTH SHORE & SOUTH BEND RAILROAD, AN INDIANA CORPORATION; JAY SAMUEL HARTT, PRESIDENT; EDWARD H. BROSS, SECRETARY; W. A. KISSEL AND WILLIAM A. QUAIL, DOING BUSINESS AS THE KISSEL ORGANIZATION, A PARTNERSHIP OF NEW YORK CITY, NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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THE DARNELL-GARNER PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the United States:

Petitioner, William Henning Rubin, *et al.*, petition this Court for the issuance of a Writ of Certiorari to the United States Court of Appeals for the 7th Circuit to review its judgment of November 24, 1954, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, to the end that its judgment be reversed with directions to reverse the judgment of the court below.

SUMMARY OF THE MATTER INVOLVED.

Petitioners, shareholders of in excess of 5 per cent of the issued and outstanding common stock of respondent railroad, an Indiana corporation, filed a Complaint for a temporary injunction restraining the corporation from proceeding with its annual meeting to be held on March 25, 1954, until the further Order of the Court, that the court decree that a by-law of the corporation requiring a majority of the directors to be residents of the State of Indiana is illegal and void, that a permanent mandatory injunction issue causing the directors to remove said by-law from the minute books, that the officers and directors of the corporation be permanently restrained from using certain proxies secured for said meeting until said by-law has been rescinded by the Board of Directors, and from paying for the solicitation of said proxies, that the Court appoint a Master in Chancery to conduct the meeting, and for general relief.

On March 23, 1954, on motion of petitioners, the Court authorized the contemplated meeting to be called and organized and directed that it be continued to March 29, 1954. Thereafter, respondents filed a Motion to Dismiss the Complaint, which Motion was sustained, and the Court of Appeals affirmed the decision. This petitioner seeks to review the decision.

QUESTIONS PRESENTED.

1. Whether the decision of the Court of Appeals in the case of *Chicago South Shore and South Bend Railroad* v. *Fleming,* 109 Fed. 2d 419, which found that respondent was a railroad engaged in interstate commerce, and not a street car or interurban line, which is a determination of a question of fact, can be relitigated or whether respondents are bound by such former determination.

2. Whether the findings of the Interstate Commerce Commission that respondent railroad is engaged in interstate commerce and is not an interurban line or street car line, is binding upon respondents.

3. Whether directors of a corporation can restrict the voting rights of its shareholders by a by-law where such restriction is not founded upon a statute.

4. Whether respondent, by applying to the Interstate Commerce Commission for consent and approval of all its acts and doings which it normally would be exempt from doing if it were an interurban or street railway, has brought itself within the definition of a full-fledged railroad and is estopped to deny a similar classification with reference to other corporate matters.

5. Whether proxies obtained through the use of confidential and privileged information by an agent formerly employed by petitioners should be prohibited.

6. Whether the decision in *Chicago South Shore and South Bend Railroad* v. *Fleming,* 109 Fed. (2d) 419, and the judgment entered pursuant to the mandate was binding upon the Trial Court and the Court of Appeals, so that petitioner was entitled to have the by-law of respondent corporation declared null and void or in the alternative a trial on the merits of the case with the right to introduce evidence.

JURISDICTION INVOKED.

The jurisdiction of this court is invoked under Sec. 1254 of the Judiciary Act of 1948 (28 U. S. C. A. Sec. 1254). The judgment was entered November 24, 1954, and the time to file the Petition was extended here to February 23, 1955, pursuant to Sec. 2101 (c) (28 U. S. C. A. Sec. 2101).

OPINION BELOW.

The opinion in the instant appeal appears as Appendix B of this Petition and is published in 217 Fed. (2d) 177.

STATEMENT.

Appellants are shareholders of record of 16,677 shares of common stock of appellee railroad, which is in excess of five per cent of all the issued and outstanding common stock of said railroad. A Complaint for mandatory injunction was filed on the 22nd day of March, 1954, to restrain appellee railroad from proceeding with its annual meeting; that the court determine and decree that the by-law of appellee corporation requiring a majority of the directors to be residents of the State of Indiana illegal and void; that the officers and directors of appellee corporation be restrained from using proxies secured for the annual meeting; and that the Court appoint a master in chancery to conduct the annual meeting of shareholders scheduled to be held on March 25, 1954, and other relief.

On the 22nd day of March, 1954, appellants filed a complaint (Tr., p. 4) against the appellee Chicago South Shore & South Bend Railroad, an Indiana corporation; Jay Samuel Hartt, President; Edward H. Bross, Secretary; W. A. Kissel and William A. Quail, doing business as the Kissel Organization, a partnership of New York City, New York, to restrain the holding of the annual meeting scheduled to be held on March 25, 1954. The purpose of the postponement of the meeting was to enable the appellants to contact the shareholders of railroad and to secure their proxies for the election of directors and the establishment of cumulative voting. Appellants contended that they were restricted in their solicitation of proxies and their ability to elect a board of directors, as appellee

railroad had enacted a by-law on its books making it mandatory that a majority of the appellee's board of directors be residents of the State of Indiana (Tr. pp. 12-13);

The appellants and the management of appellee railroad became involved in a great deal of correspondence with the Securities and Exchange Commission over the question of including certain statements regarding the illegal by-law; the appellants did not secure final approval of their proxy letter from the Securities and Exchange Commission until the 22nd day of March, 1954, and the annual meeting of shareholders was scheduled to be held on the 25th day of March, 1954. (Tr. p. 18.)

Appellant Rubin, on February 19, 1954, filed with the Securities and Exchange Commission a copy of the proxy statement which he intended to use in connection with the solicitation of proxies for the annual meeting scheduled to be held on the 25th day of March, 1954, but approval was not obtained till March 22nd, 1954, just 3 days before the meeting. (Tr. p. 13.)

Appellant's proxy letter solicited proxies for only three directors since appellant intended to nominate certain incumbent members of the board of directors. Appellant was then advised by the Securities and Exchange Commission that under Rule X-14 A-4d, no proxy could confer authority to vote for election of any person to office for which a bona fide nominee was not named in the proxy statement. (Tr. p. 13)

Appellant Rubin then contacted six incumbent directors, who advised appellant Rubin that they would not act as nominees since they were nominees of management. Appellants contended that incumbent directors' refusal to act if nominated by appellants, was a conspiracy to prevent appellants from securing five Indiana residents to act as directors in order to comply with the illegal by-law. (Tr. p. 14.)

Appellees had hired a proxy soliciting firm, W. A. Kissel and William A. Quail, doing business as the Kissel Organization, a partnership of New York City, New York, to solicit proxies on their behalf.

Appellants contended that the Kissel Organization having been employed by appellant Rubin to solicit proxies for the annual meeting of March 26, 1953, obtained certain information in trust and in confidence from appellant Rubin and said proxy firm was now using said information in favor of management and against appellant Rubin. (Tr. p. 16.)

Appellee railroad operates an electric railroad between Chicago, Illinois and South Bend, Indiana, approximately 90 miles in length. Appellee parallels and competes with lines of the New York Central System. Approximately 6.39 miles of its line between the Indiana-Illinois State Line and Kensington, Illinois, is leased from the Kensington and Eastern Railroad Company, a subsidiary of the Illinois Central Railroad Company, and appellee has trackage rights over the Illinois Central's electrified suburban line between Kensington and Randolph Street in Chicago, 14.2 miles.

Although the appellee originally incorporated in 1925 under the Act of June 4, 1861, entitled "An Act for the incorporation of street railroad companies," the appellee, by virtue of the Articles of Reorganization which it filed on the 18th day of September, 1929, dropped its status as a "street railway company" and became a common carrier, upon filing said Articles of Reorganization which specifically provided on page 1, paragraph 5 of said Articles of Incorporation, "This Corporation hereby accepts all of the terms and conditions of the Indiana 'General Corporation Act', approved March 16, 1929, Chapter 215, of the Acts of the Indiana General Assembly, 1929."

Appellee is a common carrier engaged in the transportation of freight and passengers in Interstate Commerce between the cities of South Bend, Indiana and Chicago, Illinois, and operates a bus line through a subsidiary from Michigan City, Indiana to Benton Harbor, Michigan.

In excess of 50 per cent of the revenue of the railroad is derived from freight moving in Interstate Commerce, 90 per cent of which originates off the line of the appellee company and is delivered to the appellee by other railroads.

The commodity handled in largest volume is coal, which is received from lines on the east and delivered to other lines on the west.

The appellee railroad is a party to a large number of tariffs publishing joint rates to and from points throughout the country and has arrangements with all other railroads for the division of inter-line freight revenues.

The appellee railroad maintains traffic solicitation offices in the City of Chicago, Illinois; Milwaukee, Wisconsin; Washington, D. C.; South Bend, Indiana; New York, New York; Philadelphia and Pittsburgh, Pennsylvania; Minneapolis, Minnesota; Cedar Rapids, Iowa; Kansas City, Missouri; Seattle, Washington; Portland, Oregon and San Francisco, California.

Employees of appellee railroad who operate over the Illinois Central tracks are required to take the same examination that the latter carrier gives to its own employees.

The tracks of appellee railroad are of standard gauge, generally with 100-pound rails, and the line used to Chicago in spots is elevated as are the other railroads in the same vicinity.

Steam locomotives could operate over this line and were used over it for construction purposes when the overhead system was rebuilt in 1925 and 1926.

On September 30, 1933, appellee railroad filed a petition in bankruptcy under Section 77B(m) of the Bankruptcy Act, 11 U. S. C. A., section 205, sub. m. of the United States of America, in the United States District Court for the reorganization of appellee railroad, claiming it was a common carrier engaged in the transportation of persons and property in Interstate Commerce, and that more than 50% of its operating revenues were from the transportation of freight in standard steam railroad freight equipment.

That pursuant to the plan of reorganization in the 77B bankruptcy case, $1,341,000.00 of bonds and $212,800.00 of five-year notes and two classes of preferred and common stock were issued.

The plan of reorganization for the issuance of new securities by appellee railroad under the 77B reorganization in the United States District Court could not be consummated until authority was granted by Division 4 of the Interstate Commerce Commission in Chicago South Shore and South Bend reorganization. 212 I. C. C. 547, 217 I. C. C. 423, 221 I. C. C. 605.

The Interstate Commerce Commission, in a number of cases, determined that the appellee railroad was a common carrier and not exempt from the Railway Labor Act as amended June 21, 1934, as an interurban railway, Railway Labor Act docket No. 8, 214 I. C. C. 167. (Tr. p. 7.)

The appellee railroad sought a determination from the Interstate Commerce Commission as to whether it was exempt from Sec 1(a) of the Carriers Taxing Act, Sec. 1(a) of the Railroad Retirement Act of 1937. (Tr. p. 8.)

The Interstate Commerce Commission, in Electric docket No. 7, 234 I. C. C. 34, found that the appellee railroad was part of the general steam railroad system of transportation and not a street, suburban or interurban electric railway. (Tr. pp. 8-9.)

In 1934, appellee railroad instituted a suit in the United States District Court for the Northern District of Indiana against James R. Fleming, the district attorney for the United States for the Northern District of Indiana, from instituting a proceeding against appellee railroad for violation of the Railway Labor Act, 45 U. S. C. A. Sec. 151, wherein the Interstate Commerce Commission intervened. (Tr. p. 10.)

The United States District Court for the Northern District of Indiana, found that appellee railroad was not within the scope of the Railway Labor Act.

An appeal was taken, and the United States Court of Appeals for the Seventh Circuit in 109 F. 2d 419, reversed the district court and found that the Interstate Commerce Commission was correct in its interpretation of the Railway Labor Act and that the appellee railroad was not an interurban or street railway but a common carrier engaged in interstate commerce. (Tr. p. 10.)

The appellee railroad has pursued its policy as a common carrier and has been operating subject to the rules and regulations of the Interstate Commerce Commission as evidenced by its filing on May 29, 1944, Finance Docket 14551, of an application for authority to issue securities under Sec. 20(a) of the Interstate Commerce Act, whereas said Act exempts interurban railroads. (Tr. p. 11.)

The majority of the meetings of the board of directors to amend the Articles of Incorporation of appellee railroad from 1930 to 1944 were held in the City of Chicago and State of Illinois instead of in the State of Indiana. On the 23rd day of March, 1954, plaintiff filed a motion for temporary injunction to restrain the meeting scheduled to be held on the 25th day of March, 1954, until the further order of the court. (Tr. pp. 22-23.)

On the 23rd day of March, 1954, an order was entered

by the Honorable Michael L. Igoe, Judge of the United States District Court, that the annual meeting scheduled for Thursday, March 25, 1954, be called, organized and continued until March 29, 1954, to enable appellants to solicit proxies. (Tr. p. 24.)

That on the 12th day of April, 1954, defendant railroad filed a motion to dismiss the complaint. (Tr. p. 25.)

That on the 4th day of June, 1954, a hearing was had on the motion of appellee to dismiss and an order was entered dismissing the cause with prejudice.

REASONS FOR GRANTING THE WRIT.

This Writ of Certiorari is sought because the issues presented herein raise important questions of Federal law.

At the present time there is a conflict in the decisions of the United States Court of Appeals and the Supreme Court of the United States. In *Chicago South Shore & South Bend Railway* v. *Fleming,* 109 Fed. (2d) 419 the Court held that the carrier is a railroad and obligated to comply with the terms of the Railway Retirement Act. In *United States* v. *Chicago North Shore & Milwaukee Railroad,* 228 U. S. 1, 53 S. Ct. 235, the Court held that the North Shore Railroad was not a common carrier within the meaning of Section 20-a of the Interstate Commerce Act, 49 U. S. C. A., Sec. 20-a and that the carrier was exempt as an interurban line. In *Sprague* v. *Woll,* 122 Fed. (2d) 128, the Court of appeals held that the Chicago North Shore & Milwaukee Railroad Company was obligated to comply with the provisions of the Railway Labor Act, 45 U. S. C. A., Sec. 151 and found the carrier to be a railroad. Both the Chicago South Shore & South Bend and the North Shore Railway were incorporated as interurban lines.

Appellee railroad contends that, even though it has as-

sumed the status of a carrier engaged in interstate commerce for all intents and purposes and complies with all of the Statutes of the United States and that of the Interstate Commerce Commission relating to carriers engaged in interstate commerce, it has the right to conduct the corporate operations of the railroad as an interurban line by virtue of its original Articles of Incorporation.

The effect on appellants is that appellee railroad, although incorporated in 1925, did not adopt a by-law until 1930, which curtails the voting rights of appellants and other shareholders of the corporation by adding qualifications of Indiana residence to candidates for the office of director, and that said by-law is not based on a statute.

There is no provision in the General Corporation Act of the State of Indiana that a majority of directors of any Indiana corporation are required to be residents of the State of Indiana. Nor is there any requirement in the Corporation Act of the State of Indiana that the majority of directors of any railroad be residents of the State of Indiana. (See 19 C. J. S., Sec. 937, Page 371 on inability of directors to restrict stockholders' rights.)

Appellee relies mainly on the original Articles of Incorporation filed by appellee railroad which described its activities as a street and interurban railway.

The Act of June 4, 1861 entitled "An Act for the Incorporation of Street Railroad Companies Act", which is the Act under which the original charter was issued to the appellee railroad, was repealed by the General Corporation Act approved March 16, 1929, Chapter 215, of the Acts of the Indiana General Assembly, 1929. The General Corporation Act of the State of Indiana further provides, Section 25-245 (4856-11):

> ACCEPTANCE OF ACT—Any corporation heretofore organized under the laws of this state for any purpose

or purposes for which a corporation might be organized under this act, and existing on March 16, 1929, may accept the provisions of this act, and thereafter avail itself of the rights, privileges, immunities and franchises provided by this act, by complying with the provisions of this article, without limitation of the foregoing, such right to accept the provisions of this act shall extend to any corporation formed under this or any other general law of this state, for any purpose or purposes for which a corporation might be organized under this act, which corporation existed on or after March 16, 1929, and whose articles of incorporation fix a time of corporate existence which has terminated or shall hereafter terminate, provided such corporation shall file its articles of acceptance within two (2) years after such termination. Such acceptance of this act may be effected by the officers, directors and stockholders of such corporation or by the persons acting as such. Upon such acceptance and compliance with the requirements of this act such corporation shall be deemed to have existed since such termination and its acts during such time shall have the same validity as if performed prior to such termination. This section shall not apply to any corporation whose corporate franchise shall have been forfeited, pursuant to the provisions of section 51 (b) (§ 25-250) of the Indiana General Corporation Act approved March 16, 1929, or pursuant to the provisions of an act concerning corporations, approved February 26, 1907, or of any other act of this state. (Acts 1929, ch. 215, § 46, p. 723; 1941, ch. 226, § 3, p. 729; 1943, ch. 94, § 1, p. 294; 1947, ch. 57, § 6, p. 160.)

The 1929 Act makes no reference to any interurban lines. It is the contention of appellants that the Act of June 4, 1861, entitled "An Act for the Incorporation of Street Railroad Companies" having been repealed and appellee railroad having filed Articles of Reorganization pursuant to the General Corporation Act of March 16, 1929, Chapter 215, the railroad is no longer a street railway or inter-

urban line merely because it received its original charter pursuant to said Act.

Appellants are entitled to their day in court to prove that the acceptance of the General Corporation Act of the State of Indiana, Section 25-245 (4856-11) Burns, takes them out of the Public Utility class and that appellants are not complying with the Public Utility sections.

The acts and activities of appellee railroad indicate that defendant, itself, acknowledged its existence as a railroad in lieu of an interurban line when it sought the protection of the Bankruptcy Laws of the United States and filed a petition for reorganization under Section 77 B (m) of the Bankruptcy Act of the United States.

Chapter VIII, Sec. 77, sub. m, defines a railroad corporation, to which that section is applicable, as

> "Any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50% of its operating revenue from the transportation of freight in standard, steam railroad freight equipment."

11 U. S. C. A., Sec. 205, sub. m.

The Court of Appeals in the Seventh Circuit, in the case of *In Re Chicago North Shore and Milwaukee Railroad Company,* 131 Federal (2d) 458, determined that the North Shore was not a railroad but an interurban line and, therefore, was not entitled to reorganization under Section 77 B (m) of the Bankruptcy Act and was relegated to reorganization under Chapter X of the Bankruptcy Act.

Appellee railroad sought a determination from the United States District Court as to whether or not it was obligated to comply with the provisions of the Railway

Labor Act. If defendant was a railroad it was obligated to comply. If it was an interurban line it was exempt. *Texas Electric Railroad Company* v. *Eastus,* D. C., 25 Fed. Supp. 825, affirmed without opinion, 308 U. S. 512, 60 S. Ct. 134.

Appellee railroad instituted a suit against the District Attorney for the Northern District of Indiana, and in that case entitled *Chicago South Shore and South Bend Railroad* v. *Fleming,* 109 Fed. 2d 419, the Court of Appeals for the 7th Circuit in that case said:

> "(4) An additional element appears in the case at bar which does not appear to have been present in the other cases. Section 77 B (m) of the Bankruptcy Act, 11 U. S. C. A., Sec. 205, sub. m, which was not changed by the Chandler Act, defines 'railroad corporation' as used in that section as any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than fifty per cent of its operating revenues from the transportation of freight in standard steam railroad freight equipment. Appellee has undergone reorganization under the provisions of section 77 which was designed to provide a means for the reorganization of railroads engaged in interstate commerce. This was permitted at appellee's request, and upon its disclosure that it was an interstate carrier, and that more than fifty per cent of its operating revenues was derived from the transportation of freight in standard steam railroad freight equipment. Having brought itself within the definition of railroad for that purpose, we think it cannot now deny similar classification for purposes of the Railway Labor Act. This, we think, constitutes substantial evidence in support of the Board's determination, and we are not permitted to disturb it."

From this decision it is apparent that the determining factor of whether or not defendant was an interurban railroad or a "full-fledged" railroad is whether or not in excess of 50% of the revenue of the railroad is derived from the transportation of freight in standard steam railroad freight equipment. This is the basis of determination used by the Interstate Commerce Commission, as set forth in its opinion in 214 I. C. C. 167. A copy of said decision is attached as Exhibit "A" to the Complaint. The finding and decision of the Commission is as follows:

> "Briefly summarizing, the South Shore derives the largest portion of its revenue from freight traffic, over 90 percent of which is interchanged with other railroads and moves in interstate commerce, including a considerable amount of through traffic handled as an intermediate carrier, and all of such traffic is generally handled in standard equipment under joint rates maintained with the steam railroads to and from points throughout the country. The South Shore was found not to be an interurban within a similar exemption provision in Rules for Testing Other Than Steam Power Locomotives, *Supra,* and it has the characteristics of a commercial railroad operated with electric power within the rule laid down in *Texas Electric Ry., supra.*
>
> We find that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban, or suburban electric railroad within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that Act."

In fact, it has become a "rule of thumb" that if a railroad derives in excess of 50 percent of its revenue from the transportation of freight in standard steam railroad freight equipment, it is a railroad and not an interurban or streetcar line for all intents and purposes. This is cor-

roborated by the decision *In re Chicago, North Shore and Milwaukee Railroad Company,* 131 Fed. (2d) 458. In that case the Court had to make a determination as to whether or not the North Shore was an interurban line or a railroad. If it was an interurban line it was entitled to reorganization under Section 77 (B) (m). Otherwise, it could only reorganize under Chapter 10 of the Bankruptcy Act. It is interesting to note that this same Court rendered the decision in the *North Shore* case, *supra,* as the case at bar, that the North Shore Railroad was not a common carrier engaged in Interstate Commerce, but an interurban line, since over 50 percent of its revenue was not derived from freight. The Court said:

> "We note that one important new element appeared in the section 77 definition of a carrier for purposes of the Bankruptcy statute. We refer to the statutory alternate exception of the street, suburban or interurban electric railway, 'which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment.' We consider this of considerable significance in the light of the emphasis placed by the Commission on the carriage of freight in its classification of the various roads.
>
> The Commission has formulated a definition in harmony with its various decisions, and which it seems to have followed generally, '* * * an electric railway which is engaged in the general transportation of freight, *whether the revenue therefrom is greater or less than its passenger revenue,* which handles the bulk of such freight in standard equipment similar to that used by the steam railroads, which freely interchanges the same with the steam railroads for transportation to or from points on their lines, a considerable portion thereof being handled in interstate or foreign commerce, and which participates in joint rates with the steam railroads for interstate transportation, has more of the characteristics of a commercial railroad operated by electric power than of an inter-

urban as that term is used in the exemption provision under consideration.' (Our italics.) *Texas Electric Railway,* 208 I. C. C. 193; upheld, *Texas Electric Ry. Co.* v. *Eastus,* D. C., 25 F. Supp. 825, affirmed without opinion, 308 U. S. 512, 60 S. Ct. 134, 84 L. Ed. 437.

It is in the light of this definition, with its primary emphasis placed on the revenues from the transportation of freight, whether such revenues are greater or less than those from the passenger traffic, that we consider the introduction by Congress of the alternate requirement of 50% of revenues from freight to prevent operation of the exemption provided in Section 77, significant. We think there can be no question but that this Road is not 'operating as a part of a general steam-railroad system of transportation.''

The same Judge which rendered the decision in *Chicago, North Shore and Milwaukee Railroad* (*supra*) and determined that the latter railroad was an interurban electric railway, since it did not derive more than 50 percent of its operating revenues from transportation of freight in standard steam railroad freight equipment, and hence was not eligible for reorganization under Section 77 of the Bankruptcy Act, rendered the decision in the case at bar, dismissing plaintiff's Complaint on the ground that it was an interurban railroad, has reversed himself. It is the contention of plaintiff that once a determination was made that defendant railroad is a common carrier and not an interurban railroad, its status could not be changed.

Appellee railroad, by seeking the advantages of Section 77 (B) (m) of the Bankruptcy Act, acknowledged its status as a railroad and urged upon the District Court for the Northern District of Indiana that the latter had jurisdiction and that its petition was filed in good faith. 11 U. S. C. A., Sec. 531. The petition for reorganization could not have been found to have been filed in good faith if defendant railroad did not come within the purview of the Act.

This Court is faced with a determination as to whether or not the appellee railroad whose status has been determined "by a Court of competent jurisdiction" can change its corporate status to meet every situation when it finds it advantageous, irrespective of the fact that its status has already been determined. Certainly, appellee railroad should be estopped from denying its existence as a common carrier in lieu of an interurban line.

The decree of the United States District Court in approving the plan of reorganization under Section 77 (B) (m) of the Bankruptcy Act was an adjudication of the corporate status of the railroad as a common carrier, especially since the Court was obligated to point out that it was not exempt under the provisions of the Act as an interurban line. 11 U. S. C. A., Section 205, sub (m). *The Chicago South Shore and South Bend Railroad* v. *Fleming,* 109 Fed. (2d) 419, was a further adjudication as to the corporate status of appellee as a railroad and not as an interurban line.

The Interstate Commerce Commission has determined in the following proceedings that appellee railroad is a railroad:

Commission's Railway Labor Act, Docket No. 8, 214 I. C. C. 167; A copy of the Commission's report together with the findings in the proceeding is attached as Exhibit "A" to Plaintiff's Complaint.

Interstate Commerce Commission Electric Railway Docket No. 7, 234 I. C. C. 34; A copy of the report and decision of the Commission is attached as Exhibit "B" to Plaintiff's Complaint.

Application of Chicago, South Shore and South Bend Railroad for Authority to Issue Securities Under Section 20a of the Interstate Commerce Act, filed May 29, 1944, Finance Docket #14551; A copy of said application is

attached as Exhibit "C" to Plaintiff's Complaint; A copy of the report of the Commission is attached as Exhibit "D" to Plaintiff's Complaint; A copy of the order approving the report of the Commission entered on the 29th day of May, 1944 is attached as Exhibit "E" to Plaintiff's Complaint.

The Courts have held that determinations of the Commerce Commission are binding if supported by substantial evidence and the Court of Appeals in the Seventh Circuit in *Chicago South Shore and South Bend Railroad* v. *Fleming,* 109 Fed. (2d) 419, *ibid,* upheld the findings of the Commission that respondent was a railroad and not an interurban line.

There is nothing to the contention of defendant railroad that once it incorporated as an interurban line it had to remain such, since the Act of June 4, 1861 entitled "An Act for the Incorporation of Street Railway Companies" was repealed; the defendant filed Articles of Reorganization on the 17th day of December, 1929, dropping its status as "street railway" and the corporation's mode of conduct by filing a petition for reorganization under Chapter 77 (B) (m) of the Bankruptcy Act and its institution of legal proceedings in the case entitled *Chicago South Shore and South Bend Railroad* v. *Fleming, ibid,* which determined defendant railroad to be a railroad and common carrier and not an interurban line. Record 5. Furthermore, the railroad's mode of conduct in filing a petition with the Interstate Commerce Commission under Section 20 a of the Interstate Commerce Act for the issuance of new securities, as set forth in its application dated May 29, 1944, Finance Docket #14551, plaintiff's Exhibit "C", is further evidence that defendant railroad has adopted and acquiesced to its status as a common carrier. Section 54-501, 502, 503, 504, 505 and 506 of Chapter 5 of the Indiana Public Service Commission Act (Burns 54-501, 502, 503,

504, 505 and 506) sets forth the procedure to be followed in connection with the issuance of stock by any Public Utility in the State of Indiana. An examination of plaintiff's Exhibit "C" which is attached hereto as Appendix "A" indicates that no petition was filed with the Public Utility Commission of the State of Indiana, and that it was not contemplated to file any petition with the Public Utility Commission for the State of Indiana. Attention is called to the last paragraph on page 4 and which extends over to page 5 of Exhibit "C", which is included as Appendix "A".

> "Upon obtaining authorization of this Commission to issue said Common Capital Stock of the par value of $12.50 per share in accordance with the proposed plan for recapitalization, the directors of Applicant having adopted a resolution pursuant to the provisions of Section 23 of The Indiana General Corporation Act (25-222 Burns Ind. St. Anno.) setting forth the proposed amendment, directing that it be submitted to a vote of the shareholders entitled to vote in respect thereof at a meeting of such shareholders called for that purpose, notice thereof having been mailed to each shareholder, the shareholders will vote on said amendment to the Articles of Incorporation and upon the said amendment being adopted by the affirmative vote of at least a majority of the outstanding shares, the Articles of Amendment (in the form of Exhibit No. 11 hereto attached) will be completed, signed in triplicate, and filed with the Secretary of State by the officers of Applicant, and thereafter filed for record with the County Recorder of La Porte County, Indiana, as required by Section 29 of The Indiana General Corporation Act (25-228 Burns Ind. St. Anno.) and will thereupon become effective and the said securities authorized by this Commission herein will then be issued."

The situation in the case at bar is quite different from that of the *Chicago, North Shore & Milwaukee Railroad*

Company, 131 Fed. (2d) 458, where the Court held that the North Shore was an interurban line and could not reorganize under Chapter VIII, Sec. 77, sub. m, 11 U. S. C. A., Sec. 205, sub. m. The Court of Appeals in the *North Shore* case had for its support the decision of the Supreme Court of the United States in the case of *United States* v. *Chicago, North Shore & Milwaukee Railroad,* 288 U. S. 1, 53 S. Ct. 245, where that Court held that the North Shore Railroad was exempt from complying with Sec. 20a of the Interstate Commerce Act, 49 U. S. C. A., Sec. 20a, in connection with the issuance of its securities, because the road was an independently operated electric interurban railway expressly excepted from the requirements of the section.

Furthermore, when all of the cases in connection with the determination by the courts that the various railroads were determined to be either an interurban line or railroad are analyzed, it is found that in each case the Interstate Commerce Commission in the first instance made a determination, after hearing all the evidence introduced by both the railroad and the moving parties, that either the railroad was a railroad or was an interurban line and exempt from complying with various statutes passed by Congress in connection with the moving of both passengers and freight in interstate commerce and certain rules and regulations applicable to the employees of the railroad and the general public.

In the case at bar, the District Court erroneously dismissed the complaint of plaintiffs-appellants on a motion to dismiss based on the fact that the original charter provided for the incorporation of appellee as an interurban line, and further erroneously reached the conclusion that if it was so incorporated as an interurban line, it must necessarily follow that it is a public utility under Sec. 5, Chapter I, of the Indiana Public Service Commission Act (Burns, 54-105).

It is quite evident that whether or not appellee railroad is a utility and subject to the rules and regulations as such, of the Indiana Public Service Commission Act, is a question of fact. In all of the cases hereinabove referred to, where the determination was made that a railroad was a railroad or a railroad was an interurban line, the courts had before them the findings of the Interstate Commerce Commission, and the only function of the courts in those cases was *to determine whether such findings were legally made and supported by substantial evidence.*

In the case at bar, the Interstate Commerce Commission has ruled in each and every instant that the railroad has before it, and the Court of Appeals for the Seventh Circuit in *Chicago, South Shore & South Bend Railroad* v. *Fleming, ibid,* concurred that appellee railroad was a railroad and not an interurban line. There is nothing indicated in the record to show why either the District Court or the Court of Appeals should permit a determination to be made as to the status of appellee railroad in contradiction to the rulings of the Interstate Commerce Commission and the Court of Appeals for the same Circuit by the recent ruling of the Court of Appeals in the case at bar. It is, therefore, urged that certiorari should issue to enable the litigants to have their day in court and prove their case. The only facts that the District Court Judge had before him were the statements of counsel *de hors* the record that appellee railroad was complying with the rules and regulations of the Public Service Commission of the State of Indiana, since it was originally incorporated as an interurban line, which was denied by counsel for plaintiff-appellants.

The District Court in the case at bar was bound to follow the decision of the United States Court of Appeals in *Chicago, South Shore and South Bend Railroad* v. *Fleming,* 109 Fed. (2d) 419 (7th Circuit), that defendant rail-

road was a common carrier engaged in interstate commerce and not an interurban railroad. In the *Fleming* case the United States Court of Appeals reversed the District Court of the State of Indiana which had earlier ruled that it was an interurban railroad and, therefore, exempt from the proviso of the Railway Labor Act, 45 U. S. C. A., Section 151. The Circuit Court of Appeals in the *Fleming* case approved the findings of the Interstate Commerce Commission to that effect and approved the findings of the Commission on the authority of *Shields* v. *Utah-Idaho C. P. Railway Co.*, 305 U. S. 177.

The District Court, in the case at bar, could not review the findings of the United States Court of Appeals in *Chicago, South Shore and South Bend Railroad* v. *Fleming* (*supra*), nor could it make a redetermination. *Sinclair* v. *Hyatt*, 86 Fed. Supp. 828; *United States* v. *Inter-Island Steam Navigation Company*, 87 Fed. Supp. 1010; *United Office and Professional Workers of America* v. *Monumental Life Insurance Company*, 88 Fed. Supp. 602; *Todd Seattle Dry Docks* v. *O'Leary*, 87 Fed. Supp. 907.

The decision of the *Fleming* case that the defendant railroad was a common carrier engaged in interstate commerce and not an interurban line was conclusive on the District Court in the case at bar. *Committee of Long Island Lighting Company* v. *Securities & Exchange Commission*, 183 Fed. (2d) 45.

The United States Supreme Court stated the proposition very clearly in *Insurance Group Committee* v. *Denver, R. G. W. R. Company*, 67 Supreme Court, 583, page 585, when it said: "When matters are decided by an Appellate Court its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to final determination. While power rests in a Federal Court that passes an order or decision to change its position on a

subsequent review in the same case, orderly judicial action, except in unusual circumstances, requires it to review to permit the re-litigation of matters or issues previously determined on a former review." *Great Western Telegraph Company* v. *Burnham,* 162 U. S. 339; *King* v. *State of West Virginia,* 216 U. S. 92; *Messenger* v. *Anderson,* 225 U. S. 436; *Wichita Royalty Company* v. *City National Bank of Wichita Falls,* 306 U. S. 103.

The Order of the Court of Appeals in *Chicago, South Shore and South Bend Railroad* v. *Fleming, ibid,* was not appealed from and the Court of Appeals for the same Circuit in the case at bar was bound by the determination of the Court of Appeals of the same Circuit in the *Chicago, South Shore and South Bend Railroad* v. *Fleming* case, *ibid. Candler* v. *Rose,* 80 F. 2d 407; *Claude Neon Lights* v. *E. Machlett & Son,* 31 F. 2d 983; *Papani* v. *United States,* 84 F. 2d 160; *Jorgenson* v. *Swope,* 114 F. 2d 988.

In fact, the Court of Appeals in *Sawyer* v. *Dollar,* 190 Fed. (2d) 623, gives a very good resume of the theory under which District Courts, Courts of Appeal, and the Supreme Court of the United States respect each other's decisions.

> "A Supreme Court decision is not necessary to make an order of a Court binding or finally dispositive of a controversy. If an order of a District Court is not appealed it is just as final in this sense as if the Supreme Court had itself entered the order. An order of any court having jurisdiction of the parties and of the subject matter is binding. It may not be *res judicata* as to other parties, but it is conclusive as to the parties before the court."

The Court of Appeals in the case at bar under "The *Stare Decisis* Rule" was bound to follow the principle of law which became settled by the decisions of the Court of Appeals of the Seventh Circuit in *Chicago, South Shore*

and South Bend Railroad v. *Fleming,* 109 Fed. (2d) 419, in the case of *In re Chicago, North Shore and Milwaukee Railroad Company,* 131 Fed. (2d) 458; *Texas Electric Railway Company* v. *Eastus,* D. C. 25 Fed. Supp. 825, affirmed without opinion, 308 U. S. 512; *Shields* v. *Utah-Idaho C. P. Railroad Company,* 305 U. S. 177, that the determining factor as to whether or not defendant railroad was a railroad or an interurban line is whether in excess of 50 percent of the railroad's revenue is derived from the hauling of freight, the type of equipment such as railroad cars and rails.

Corpus Juris, in discussing "The *Stare Decisis* Rule", 21 C. J. S., Section 187, p. 303, says:

> "This rule, which has been stated, *infra,* Sec. 193, to be merely an application of the doctrine of estoppel to court decisions, and which is usually known and referred to as the rule of *stare decisis,* is founded largely on considerations of expediency and sound principles of public policy, to preserve the harmony and stability of the law, and to make as steadfast as possible judicially declared principles affecting the rights of property, it being indispensable to the due administration of justice, especially by a court of last resort, that a question once deliberately examined and decided should be considered as settled and closed to further argument."

In the railroad cases, the purpose of the Interstate Commerce Commission is to regulate common carriers in a uniform manner on the question of rates, wages, operating standards and many other problems. Congress has seen fit to delegate to the Commission the power to make determinations of fact and, thereby, relieve the Courts of the duty and obligation of referring such matters to special Masters and others who may be unacquainted with railroad procedure. To bolster the findings of the Commission, the Courts have taken the position that findings of the Inter-

state Commerce Commission will not be disturbed unless they are clearly erroneous and said findings are not based on the facts.

Sprague v. *Woll,* 122 F. 2d 128, 131; *Chicago, South Shore and South Bend Railroad Co.* v. *Fleming,* 109 F. 2d 419; *Interstate Commerce Commission* v. *Delaware, L. & W. R. R. Co.,* 220 U. S. 235, 31 S. Ct. 392; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 33 S. Ct. 185; *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, 39 S. Ct. 375; *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268, 46 S. Ct. 500; *Florida* v. *United States,* 292 U. S. 1, 12, 54 S. Ct. 603, 608.

The District Court in the case of *Toolson* v. *New York Yankees,* 101 Fed. Supp. 93, which case was affirmed by the Court of Appeals in 200 Fed. 2d 198, says:

> "Trial courts in my opinion should not devote their efforts to guessing what reviewing courts may do with prior holdings because of lapse of time or change of personnel in such courts. We are supposed to be living in a land of laws. Stability in law requires respect for the decisions of controlling courts or face chaos."

The Interstate Commerce Commission approved the plan of reorganization of the *Chicago, South Shore and South Bend Railroad* in 212 I. C. C. 547, 217 I. C. C. 423, 221 I. C. C. 605.

In 1935 the Interstate Commerce Commission rendered a decision in, *Railroad Labor Docket,* 214 I. C. C. 167, at the instance of the National Mediation Board, that defendant was a common carrier engaged in interstate commerce. On June 2, 1938, appellee railroad instituted before the Interstate Commerce Commission proceedings to determine whether said railroad fell within the terms of the

proviso of Section 1(a) of the Carriers' Taxing Act, Section 1(a) of the Railroad Retirement Act of 1937. (Tr. p. 8.) A copy of the report and decision of the *Interstate Commerce Commission Electric Railway Docket No. 7,* 234 I. C. C. 34 (Plaintiff's Exhibit B), indicated that appellee railroad was found to be a common carrier. (Tr., pp. 8, 9, abstracts of decision.)

On May 29, 1944, appellee railroad, pursuing its policy as a common carrier subject to the rules and regulations of the Interstate Commerce Commission, filed an application for authority to issue securities under Section 20(a) of the Interstate Commerce Act. Finance Docket No. 14451. A copy of the application was attached to the Complaint as Plaintiff's Exhibit C. That on the 29th day of May, 1944, the Interstate Commerce Commission rendered a report finding that defendant was a common carrier and that the exchange of 77,895 shares of common stock of the par value of $50.00 per share for 311,580 shares of common stock of the par value of $12.50 a share was a lawful object within the corporate purposes of the railroad.

The copy of appellee railroad's application to the Interstate Commerce Commission is attached to plaintiff's Complaint as Exhibit C. (Tr., p. 11, abstracts of decision.) appellee's application under Sec. 20-a of the Interstate Commerce Act hereinabove referred to in Finance Docket No. 14551, recites:

> "Applicant is a corporation duly organized and existing under the laws of the state of Indiana with its principal place of business and office in the city of Michigan City, in La Porte County, Indiana. Applicant was incorporated June 23, 1925, and accepted the provisions of The Indiana General Corporation Act by executing Articles of Reorganization dated September 16, 1929, which were filed with and approved by the Secretary of State of Indiana, September 18, 1929, and filed for record in the recorder's office of La Porte

County, Indiana, October 3, 1929. Applicant is duly admitted as a foreign corporation to do business in the State of Illinois and has been so authorized and admitted to do business since July 10, 1925. Applicant is engaged as a common carrier in the transportation of passengers and property by electric railroad over a line approximately 90 miles in length between Randolph Street in the city of Chicago in the State of Illinois and the city of South Bend in the State of Indiana, and intermediate points. Applicant carries passengers, freight, baggage, express and the United States mail over its line of railroad and as a common carrier is open to the public generally."

That 49 U. S. C. A., Section 20-a, Paragraph 1, Securities of carrier; issuance, *et al.*, provides:

" 'Carrier' defined.

(1) As used in this section, the term 'carrier' means a carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter, or a sleeping car company which is subject to this chapter.

Since paragraph 1 of Section 49, U. S. C. A., section 20-a provides 'as used in this section the term "carrier" means a common carrier by railroad (excepting street, suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation)' if the defendant railroad considered itself as an interurban electric railway, no application to issue the securities hereinabove referred to would have been needed."

Appellee railroad is estopped to deny its existence as a common carrier by virtue of the fact that, commencing with the filing of the petition for reorganization under Section 77(b)(m) of the Bankruptcy Act and the subsequent determinations by the Interstate Commerce Commission to

determine the status of appellee railroad, namely, 212 I. C. C. 547, 217 I. C. C. 423, 221 I. C. C. 605, Railway Labor Act Docket No. A214, I. C. C. 167, 234 I. C. C. 39, Finance Docket No. 14451, and the decisions of the United States Court of Appeals in *Chicago, South Shore and South Bend Railroad* v. *Fleming,* 109 Fed. (2d) 419. Appellee railroad cannot assume the status of a common carrier on the one hand, in order to market its securities, and deny its existence on the other hand in order to enable present management to perpetuate itself in office by limiting the number of individuals who would be eligible to office as Directors in appellee railroad. *Chicago, South Shore and South Bend Railroad* v. *Fleming,* 109 Fed. (2d) 419. This principle was further sustained in the case of *Holly Hill Citrus Growers Association* v. *Holly Hill Fruit Products,* 75 Fed. (2d) 13, where the Court held that an orchard development company was precluded from denying marketing corporations the right to trade-marks under principle of evidential estoppel which is raised when persons who have acted one way under one set of circumstances and with one objective undertaken under other circumstances when the objective has changed, testimonially to give different color to their former conduct. See *Anderson* v. *Abbott,* 23 Fed. Supp. 265; *Guaranty Trust Company of New York* v. *Williamsport Wire Rope Company,* 20 Fed. Supp. 634, affirmed; *Comstedt* v. *Gilmore,* 96 Fed. (2d) 766.

Appellants-petitioners were entitled to present evidence on the question as to whether or not the proxy-soliciting firm that was once in the employ of petitioner Rubin was using confidential information obtained during the course of their employment. Certainly, there was no basis to prevent petitioners from being heard on this question and to their day in court.

A proxy soliciting firm with its agents is in the same

category as a lawyer or doctor or salesman in whom the employer reposes his complete faith and confidence in representing him to the general public. In order for the salesman to sell his wares and properly represent his employer or client, it is necessary that all of the facts be disclosed without any limitations. Courts of law have always recognized this principle and have safeguarded the employer against the act of the employee in divulging the trade secrets that the employee acquired during the course of his employment.

Accordingly, attorneys employed as claim adjusters are disqualified after severing relations with their employers to bring action against the employees on behalf of persons they have investigated. *Hovel* v. *Minneapolis and St. Louis Railroad Company,* 206 N. W. 710. In the case of *Harvey* v. *Harvey,* 231 N. W. 580, the Court held that the conduct of the attorney for the plaintiff in commencing an action against former clients concerning matters, a matter in which he appeared as their attorney and confidential adviser was unprofessional.

It has also been held in the case of *Baker* v. *Farnsworth,* 221 N. W. 71, that litigants may not secure the fruits of a decree obtained by an attorney who he knows professionally represented his adversary over the latter's objections in the same subject matter. It has also been held that a lawyer having once held public office or having been in the employ of the public should not after his retirement accept employment in connection with any matter he has investigated or passed upon in office or in his employment.

In re Williams, 50 Pac. 729, Rule X-14(A)-9 of the Securities and Exchange Commission provides:

> "No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication written or

> oral containing any statement which at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

Proxies were solicited as charged in the Complaint by the making of false statements concerning plaintiffs' intentions, attitudes and their proposals and this Court had jurisdiction to restrain the use of said proxies.

It is further well settled law that an agent may not engage in a competing business or otherwise put himself in a position in which his interests will conflict with his duties to his principal. *Brown* v. *Dupuy,* 4 Fed. (2d) 467. *Francis Mohawk Mining & Leasing Company* v. *McKay,* 141 Pac. 56.

The right of an employer to enjoin the use of confidential information which has been disclosed by an employee was further confirmed in *Tabor* v. *Hoffman,* 118 N. Y. 30, 23 N. E. 12.

Whether or not the by-law of appellee railroad corporation is required by virtue of Section 12 of the Indiana Public Service Commission Act, Chapter 2, and by virtue of the following definitions in Section 5 of that statute (Ch. 54, Burns' Indiana Statutes, 105) which require a majority in number of the Board of Directors of a street railway or interurban railway to be residents of the State of Indiana, depends on a determination of a question of fact as to whether or not appellee is a railroad engaged in interstate commerce or is an interurban line. From what we have said heretofore, it is quite evident that appellants take the position that because of the decision of the

Interstate Commerce Commission and the United States Court of Appeals in 109 Fed. (2d) 419, the question has already been resolved. If, however, this Court is of the opinion that whether or not appellee railroad is an interurban line or a railroad must be re-determined, certainly that question could not have been decided on a motion to dismiss the Complaint. Courts have declared that a Complainant need only show that its position is jeopardized by statute, regulation or order and thereupon the Court will afford relief for any uncertainties with respect to the individual's rights. In *Gordon* v. *Bowles,* 153 Fed. (2d) 614, the Court, on page 615, says:

> "The Constitution 'guarantees no particular form of procedure; it protects substantial rights.' *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 58 S. Ct. 904, 913, 82 L. Ed. 1381. Cf. *Morgan* v. *United States,* 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288. It requires that there shall be a hearing at which each party can be heard and by virtue of which substantial enjoyment of his constitutional rights is preserved. The Declaratory Judgment Act, 28 U. S. C. A. Sec. 400, we think, affords complainant a complete remedy. Under that Act, if there is a reasonable dispute between the parties as to application and interpretation of an act of Congress or administrative order, either party has a right to resort to the District Court in an application for declaratory judgment. There witnesses may be examined and cross-examined. The complainant need only show that his position is jeopardized by the statute, regulation or order, and thereupon the court will afford relief for any uncertainties with respect to his rights. He is not required to wait indefinitely. The proceeding has the advantage of escaping any technical distinction between law and equity and enables the court to reach the desired goal in the speediest and most inexpensive form. *United States Fidelity & Guaranty Co.* v. *Koch,* 3 Cir., 102 F. 2d 288, 290, 295; *Sunshine Mining Co.* v. *Carver,* D. C. D. Idaho, 41 F. Supp. 60, 63."

Plaintiffs are limited to the number of individuals who can be elected as Directors of defendant railroad by virtue of the by-law requiring that a majority of the Directors be residents of the State of Indiana. The stock of defendant corporation is held by approximately 3,700 shareholders scattered from coast to coast. Under these circumstances, it is impossible for minority shareholders to elect a representative board, a majority of whom are residents of the State of Indiana and at the same time shareholders. Furthermore, no other railroad operating in the State of Indiana or incorporated in the State of Indiana is required to elect Directors, a majority of whom are residents of the State of Indiana.

CONCLUSION.

It is respectfully submitted that this Court should grant this petition for certiorari to prevent the relitigation of the question of fact as to whether or not a railroad is or is not a common carrier engaged in interstate commerce and subject to the various statutes of the United States concerning the operation of railroad carriers. 11 U. S. C. A., Section 205; Section 77-B (m) of the Bankruptcy Act of the United States; 45 U. S. C. A., Section 151; Railway Labor Act; 45 U. S. C. A., Section 228 (a); Section 1 (a) of the Railroad Retirement Act of 1938; 45 U. S. C. A., Section 261 (a); Section (a), Carriers Taxing Act of 1937; Section 20 (a) of the Interstate Commerce Commission Act. The relitigation of issues based on questions of fact after they were once decided is legally unwarranted. In the interest of all carrier railroads, the Interstate Commerce Commission, the stockholders of the carrier railroad and the general public, it is not good policy to have the issue of common carrier and interurban line retried on a question of fact for each statute enacted by Congress as to which classification the carrier fits into. No corporation can properly function if

it is to have a different status in the state of its domicile and another status upon crossing the state border. Furthermore, appellants-respondents should be entitled to their day in court in order to prove and have determined the question of fact as to whether or not the General Corporation Act of 1929 of the State of Indiana has superseded the Act of 1861 under which appellee-respondent was incorporated. In addition thereto, appellants' rights to elect directors should not be restricted to residents of Indiana at the discretion of the directors of appellee-railroad unless the statute of the state specifically makes the residence a prerequisite to the election of the director. A corporation cannot set up as a defense a doctrine of *ultra vires* since that writ is reserved to the stockholder to question the right of the Corporation to act and which is in essence what the corporation is attempting to do. If the decision of the Court of Appeals in the instant case is permitted to stand, appellee would be authorized in any future proceeding to enforce various provisions of the Interstate Commerce Act to seek refuge on the theory that the carrier is permitted to have a separate determination by the Interstate Commerce Commission in each case as to whether or not it is a carrier or an interurban railroad within the exemption of the Commerce Act. These circumstances should motivate the Supreme Court to grant this petition for certiorari.

Respectfully submitted,

WILLIAM HENNING RUBIN,
33 South Clark Street,
Chicago 3, Illinois,
Attorney for Petitioners.

APPENDIX A.

Original Signed.

Before the
INTERSTATE COMMERCE COMMISSION
Finance Docket No. 14551

APPLICATION
of
Chicago South Shore and South Bend Railroad
For Authority to Issue Securities under
Section 20a of the
Interstate Commerce Act

JOHN C. LAWYER,
R. STANLEY ANDERSON,
JOSEPH D. LAWYER,
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Filed May 10, 1944
Interstate Commerce Commission

May 5, 1944.

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Before the
INTERSTATE COMMERCE COMMISSION
Finance Docket No. .....

APPLICATION
of
Chicago South Shore and South Bend Railroad
For Authority to Issue Securities under
Section 20a of the
Interstate Commerce Act

To The Honorable The Interstate Commerce Commission:

Chicago South Shore and South Bend Railroad, Applicant herein, respectfully represents:

1. The exact corporate name of Applicant is: Chicago South Shore and South Bend Railroad.

2. The names, titles and post office addresses of the Applicant's vice president, secretary, comptroller, and attorneys by whom the application is signed, verified and filed on behalf of Applicant are as follows:

CHARLES H. JONES, *Vice President,*
Michigan City, Indiana,
EDWARD H. UTLEY, *Secretary and Comptroller,*
Michigan City, Indiana,
JOHN C. LAWYER, R. STANLEY ANDERSON and
JOSEPH D. LAWYER, *Attorneys for Applicant,*
701—5305 Hohman Avenue,
Hammond, Indiana.

3. Applicant is a corporation duly organized and existing under the laws of the state of Indiana with its principal place of business and office in the city of Michigan City, in La Porte County, Indiana. Applicant was incorporated

June 23, 1925 and accepted the provisions of The Indiana General Corporation Act by executing Articles of Reorganization dated September 16, 1929, which were filed with and approved by the Secretary of State of Indiana, September 18, 1929 and filed for record in the recorder's office of La Porte County, Indiana, October 3, 1929. Applicant is duly admitted as a foreign corporation to do business in the state of Illinois and has been so authorized and admitted to do business since July 10, 1925. Applicant is engaged as a common carrier in the transportation of passengers and property by electric railroad over a line approximately 90 miles in length between Randolph Street in the city of Chicago in the state of Illinois and the city of South Bend in the state of Indiana, and intermediate points. Applicant carries passengers, freight, baggage, express and the United States mail over its line of railroad and as a common carrier is open to the public generally.

4. The Applicant operates as a carrier in the states of Indiana and Illinois.

5. The nature of the application and the purposes and uses of the proposed issue and the proceeds thereof are as follows:

Applicant has issued and outstanding 77,895 shares (including as of December 31, 1943, 1,228 shares reserved for exchange under the plan of recapitalization effective April 30, 1942, authorized by the order of this Commission entered February 27, 1942 in Finance Docket No. 13628) of Common Capital Stock of the par value of $50.00 per share. Said order of this Commission of February 27, 1942, authorized Applicant to issue not exceeding 77,904 shares of Common Capital Stock of the par value of $50.00 per share in exchange for the outstanding First Preferred Stock and Second Preferred Stock on the basis indicated in the order. In making the exchange fractional shares that resulted in connection with the exchange of the First Preferred shares

for shares of the present Common Capital Stock of the par value of $50.00 per share amounting in the aggregate to nine full shares, were purchased at the rate of the current market value of $20.00 per share, and canceled by Applicant, in order to avoid the issuance of fractional shares.

It is now desired to convert the said present issued and outstanding shares of Common Capital Stock of the par value of $50.00 per share into shares of Common Capital Stock of the par value of $12.50 per share on the basis of four shares of such Common Capital Stock of the par value of $12.50 per share for one share of the present Common Capital Stock of the par value of $50.00 per share.

6. The conversion of the Common Capital Stock of the par value of $50.00 per share into Common Capital Stock of the par value of $12.50 per share may be made by an amendment of the Articles of Incorporation upon an affirmative vote of the holders of at least a majority of the Common Capital Stock issued and outstanding. Such issue is for a lawful object within the corporate purposes of Applicant and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by the Applicant of service to the public as a common carrier, and which will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purpose.

7. The new Common Capital Stock of the par value of $12.50 per share will not be sold but will be issued in exchange for the present outstanding Capital Stock on the following basis:

The said 77,895 shares of Common Capital Stock of the par value of $50.00 per share now issued and outstanding as aforesaid, shall become and be converted into 311,580 shares of Common Capital Stock of the par value of $12.50 per share on the basis of four shares of Common Capital

Stock of the par value of $12.50 per share for each share of Common Capital Stock now outstanding of the par value of $50.00 per share.

Upon surrender to the corporation of certificates representing or entitling the holder to outstanding shares of Common Capital Stock of the par value of $50.00 per share, such holder shall be entitled to receive therefor certificates representing shares of Common Capital Stock of the par value of $12.50 per share on the basis of four shares of Common Capital Stock of the par value of $12.50 per share for one share of Common Capital Stock of the par value of $50.00 per share.

8. The new Common Capital Stock of the par value of $12.50 per share will be issued by Applicant to its present security holders upon the basis herein stated. The issue will be handled by Applicant without any underwritings, contracts or other arrangements in connection with the issue.

Upon obtaining authorization of this Commission to issue said Common Capital Stock of the par value of $12.50 per share in accordance with the proposed plan for recapitalization, the directors of Applicant having adopted a resolution pursuant to the provisions of Section 23 of The Indiana General Corporation Act (25-222 Burns Ind. St. Anno.) setting forth the proposed amendment, directing that it be submitted to a vote of the shareholders entitled to vote in respect thereof at a meeting of such shareholders called for that purpose, notice thereof having been mailed to each shareholder, the shareholders will vote on said amendment to the Articles of Incorporation and upon the said amendment being adopted by the affirmative vote of at least a majority of the outstanding shares, the Articles of Amendment (in the form of Exhibit No. 11 hereto attached) will be completed, signed in triplicate, and filed with the Secretary of State by the officers of Applicant,

and thereafter filed for record with the County Recorder of La Porte County, Indiana, as required by Section 29 of The Indiana General Corporation Act (25-228 Burns Ind. St. Anno.) and will thereupon become effective and the said securities authorized by this Commission herein will then be issued.

9. Attached hereto and made a part hereof are the following exhibits:

Exhibit

No. 1—Attested copy of amendment of Applicant's Articles of Incorporation, adopted by resolution of stockholders on March 25, 1943.
Applicant's Articles of Incorporation with prior amendments filed with this Commission as Exhibit 1, pages 13 to 86 of the Application dated January 30, 1942, and the attested copy of the amendments to the Articles of Incorporation voted by stockholders April 30, 1942, and filed with this Commission on May 6, 1942, Finance Docket No. 13628, are by reference thereto made a part hereof.

No. 2—Authenticated copy of Applicant's by-laws, with amendments to date.

No. 3—Authenticated copy of resolutions of the board of directors of Applicant adopted May 5, 1944, authorizing proceedings to recapitalize.

No. 4—Authenticated copy of resolutions of the board of directors of Applicant adopted May 5, 1944, designating officer to file this Application.

No. 5—Opinion of Counsel.

No. 6—Map of Applicant's railroad.

No. 7—Form of present Common Capital Stock certificate of the par value of $50.00 per share and form of Common Capital Stock certificate of the par value of $12.50 per share, proposed to be issued in exchange for present capital stock.

No. 8—Verified statement of the income of Applicant

for the years ended December 31, 1942 and 1943.

No. 9—Verified copy of Applicant's balance sheet as of December 31, 1943.

No. 10—Statement of complete details of the purposes of the proposed issue.

No. 11—Proposed Articles of Amendment of the Articles of Incorporation.

WHEREFORE, Applicant prays that after investigation by the Commission of the purposes and uses of the proposed issue of Capital Stock the Commission by order duly authorize such issue and change in the par value of said Common Capital Stock, and Applicant further prays for all other appropriate relief in the premises.

DATED at Michigan City, Indiana, this 5th day of May, 1944.

Respectfully submitted,

CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD
(CORPORATE SEAL) By CHARLES H. JONES
Its Vice President
Michigan City, Indiana.

ATTEST:
EDWARD H. UTLEY,
Its Secretary

JOHN C. LAWYER,
R. STANLEY ANDERSON,
JOSEPH D. LAWYER,
Attorneys for Applicant,
701-5305 Hohman Avenue,
Hammond, Indiana.

STATE OF INDIANA
COUNTY OF LA PORTE } ss.

EDWARD H. UTLEY, being duly sworn, deposes and says that he has duly executed the attached Application for and on behalf of Chicago South Shore and South Bend Railroad named therein; that he is the secretary and comptroller of the Company and that he is duly authorized by the Applicant to verify and file this Application. Deponent further says that he is familiar with such Application and the transactions referred to therein and that the matters and things therein stated are true.

EDWARD H. UTLEY.

Subscribed and sworn to before me this 5th day of May A.D. 1944.

FRED A. KOLB
Notary Public

(NOTARY SEAL)

My Commission expires November 8, 1945.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11230. October Term, 1954, October Session, 1954.

William Henning Rubin, Morton H. Bernstein, John E. Kelly, Sr., and Lillian M. Kelly, his wife; John E. Kelly, Jr. and Charles Turner,
Plaintiffs-Appellants,
vs.
Chicago South Shore & South Bend Railroad, an Indiana Corporation; Jay Samuel Hart, President; Edward H. Bross, Secretary; W. A. Kissel and William A. Quail, doing business as the Kissel Organization, a partnership of New York City, New York,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 24, 1954.

Before DUFFY, *Chief Judge,* FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* A complaint was filed in the District Court by plaintiffs, who are Illinois stockholders of the defendant Indiana corporation, against the

corporation[1] and its president and secretary, as well as the members of a proxy soliciting partnership known as Kissel Organization. The complaint prays for a temporary injunction restraining the corporation from proceeding with its annual meeting to be held on March 25, 1954, until the further order of the court, that the court decree that a by-law of the corporation requiring a majority of the directors to be residents of the state of Indiana is illegal and void, that a permanent mandatory injunction issue causing the directors to remove said by-law from the minute-books, that the officers and directors of the corporation be permanently restrained from using certain proxies secured for said meeting until said by-law has been rescinded by the board of directors and from paying for the solicitation of said proxies, that the court appoint a master in chancery to conduct the meeting, and for general relief.

On March 23, 1954, on motion of plaintiffs, the court authorized the contemplated meeting to be called and organized, and directed that it be continued to March 29, 1954.

Thereafter South Shore filed a motion to dismiss the complaint, which motion was sustained. This appeal followed.

The principal question in this case is raised by plaintiffs' contention that the following by-law adopted by the directors of the corporation is invalid: "A majority of the directors shall be residents of the state of Indiana."

The motion to dismiss admits, *inter alia,* the facts set forth in the complaint as now stated.

Plaintiffs are owners of shares of the common stock of South Shore which maintains an office in Chicago, Illinois. Although it was originally incorporated in 1925 under an Indiana statute entitled "An Act for the incorporation of

1. Hereinafter sometimes referred to as "South Shore."

street railroad companies'"[2] it later became subject to the general corporation act of Indiana by filing articles of reorganization on September 18, 1929, providing "This Corporation hereby accepts all of the terms and conditions of the Indiana 'General Corporation Act,' of 1929."

South Shore is a common carrier engaged in transportation of freight and passengers in interstate commerce between the cities of South Bend, Indiana, and Chicago, Illinois, and operates a bus line through a subsidiary from Michigan City, Indiana, to Benton Harbor, Michigan. In excess of 50 percent of its revenue is derived from freight moving in interstate commerce. It is a party to a large number of tariffs publishing joint rates to and from points throughout the country and has arrangements with all other railroads for the division of inter-line freight revenues. It has traffic solicitation offices in various states. It operates an electric railroad between Chicago and South Bend, which is approximately 90 miles in length and parallels and competes with lines of the New York Central System.

Following South Shore's filing a petition under Section 77 of the Bankruptcy act[3], in the United States District Court on September 30, 1933, a plan of reorganization was approved, which plan "could not be consummated until authority was granted" by the Interstate Commerce Commission.

In 1935, in a proceeding before the Interstate Commerce Commission there was a finding and decision that South Shore was not a street, interurban, or suburban electric railway within the meaning of the exemption proviso of the first paragraph in § 1 of the Railway Labor act, as amended June 21, 1934.[4]

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2. Approved June 4, 1861. Sec. 13,297 *et seq.* Burns Indiana Statutes, 1926 Ed.

3. 11 U. S. C. A. § 205.

4. 45 U. S. C. A. § 151.

In a proceeding instituted by South Shore before the Interstate Commerce Commission on June 2, 1938, the commission decided that on and after said date the defendant corporation was not within the terms of similar exemptions in section 1(a) of the Railroad Retirement act of 1937[5] or section 1(a) of the Carriers Taxing act of 1937[6].

In 1939 South Shore filed a suit in the District Court of United States for the Northern District of Indiana to enjoin James R. Fleming, United States district attorney, from instituting a proceeding against it for violation of the Railway Labor act[7], wherein the Interstate Commerce Commission intervened. Thereupon the court determined that South Shore was not within the scope of the Railway Labor act. Upon appeal to this court[8] that determination was affirmed.

In 1944 South Shore requested permission of the Interstate Commerce Commission to issue shares of capital stock, and the commission rendered a report finding that South Shore was a common carrier and approved the issue. The application recited that South Shore is a corporation duly organized and existing under the laws of the state of Indiana, having been incorporated June 23, 1925, and having accepted the provisions of the Indiana general corporation act by executing articles of reorganization dated September 16, 1929, which were filed with and approved by the Secretary of State of the state of Indiana, that it is engaged as a common carrier in the transportation of passengers and property by electric railroad between Chicago, Illinois, and South Bend, Indiana, and intermediate points, and that its principal place of business is Michigan City, Indiana.

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5. 45 U. S. C. A. § 228a.
6. 45 U. S. C. A. § 261a.
7. 45 U. S. C. A. §§ 151 *et seq.*
8. *Chicago S. S. & S. B. R. R.* v. *Fleming*, 109 F. 2d 419.

Prior to plaintiffs' acquisition of their stock, directors of South Shore adopted a by-law known as section 1 of article IV as hereinbefore set forth[9]. There is no provision in the general corporation act requiring a majority of directors to be residents of Indiana.

9. The motion to dismiss states that this by-law was adopted in 1930. Appellee's brief states this by-law "has stood unassailed for more than 24 years." Plaintiffs have not questioned these statements at any time in this court.

The complaint alleges that the Kissel Organization was employed by plaintiff Rubin to solicit proxies for the annual meeting held on March 26, 1953, and thereby it "obtained information in trust and in confidence and is now in the employ of the defendant railroad, whose interests are adverse to that of plaintiffs" and further that said firm "is using said information that was received in trust and in confidence to obtain proxies in favor of management and against that of plaintiff Rubin."

According to plaintiffs there are two contested issues:

a. "Is defendant railroad a common carrier engaged in interstate commerce, or an interurban or street car line? If defendant railroad is a common carrier engaged in interstate commerce, then the restrictive by-law limiting a majority of the corporation's directors to residents of the state of Indiana is void and of no force and effect."

b. "Is defendant railroad authorized to hire a proxy-soliciting firm which had heretofore been retained and engaged in proxy solicitation for one of the plaintiffs and during the course of said employment with plaintiff obtained certain confidential and privileged information which is being used against the plaintiffs?"

However, defendant insists that the only contested issue is whether South Shore's by-law requiring a majority of its directors to be residents of Indiana is valid.

Inasmuch as it appears that the annual meeting orig-

inally set for March 25, 1954, was continued to March 29, 1954, and that the meeting was held and its business transacted, it may be that this entire case became moot. However we shall resolve any doubt against that conclusion and proceed to a determination of certain aspects of the merits.

1. Section 2 of the Indiana General Corporation act[10] provides:

> "Corporations may be organized for pecuniary profit under this act for any lawful business purpose or purposes, except rural loan and savings associations, credit unions or corporations for the conduct of a banking, railroad, insurance, surety, trust, safe deposit, mortgage guaranty or building and loan business."

Section 7 of the same act[11] provides in part:

> "The power to make, alter, amend or repeal the by-laws of a corporation shall be vested in the board of directors, unless otherwise provided in the articles of incorporation. * * *"

Section 9 of said act[12] provides in part:

> "The business of every corporation shall be managed by a board of directors, at least a majority of whom are citizens of the United States. Directors need not be shareholders in the corporation unless the articles of incorporation or by-laws so require, but shall have other qualifications as the by-laws prescribe. * * *."

Section 73 of said act[13] repealed certain sections of the street railroad companies act of June 4, 1861.

Article 2(b) of South Shore's articles of incorporation, as amended in 1944, provides in part, as follows:

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10. Burns Indiana Statutes, 25-201.
11. Ibid., 25-206.
12. Ibid., 25-208.
13. Ibid., 25-404.

"To maintain and operate, and to that end to construct, purchase, lease or otherwise acquire, own and control street railroad, interurban street railroad and suburban street railroad lines and systems, * * *."

Section 1 of Article IV of South Shore's by-laws provides:

"A majority of the directors shall be residents of the State of Indiana."

The source of South Shore's corporate powers is the State of Indiana, by virtue of whose act for the incorporation of street railroad companies it was originally organized and by virtue of whose general corporation act it has existed since September 18, 1929. From that source South Shore's board of directors derived general power to make by-laws and specific power to make by-laws prescribing qualifications for directors, which are in addition to the statutory qualification that at least a majority of the board of directors are to be citizens of the United States.

Moreover, it is apparent that its adoption was not because of any ulterior or improper motive aimed at plaintiffs. It was adopted in 1930 and obviously is authorized by the Indiana Public Service Commission act. That act provides that the term "public utility" as therein used means and embraces every corporation owning, operating, managing or controlling any street railway or interurban railway[14], and requires that a majority in number of the board of directors thereof shall be bona fide residents and citizens of the State of Indiana[15].

Under these statutory provisions South Shore's by-law now under attack is valid. If, in the conduct of its business, it is exceeding or deviating from its charter powers, that

14. Burns Indiana Statutes, 54-105.

15. Ibid., 54-212.

is a matter for the state itself to assert in a direct proceeding brought for that purpose.

It is immaterial in the litigation before us that the agencies of governments other than the state of Indiana may have determined for their own legislative or administrative purposes that South Shore is a railroad engaged in interstate commerce. South Shore's corporate structure, including such matters as the qualifications required of its directors, is a matter controlled entirely by Indiana law.

Plaintiffs argue that South Shore, when it accepted all of the terms and conditions of the Indiana general corporation act in 1929, dropped its status as a "street railway company" which it had acquired when it was originally incorporated in 1925 under the act of June 4, 1861, and became a common carrier engaged in the transportation of freight and passengers in interstate commerce. We assume that by this argument plaintiffs mean that South Shore's status thereby was changed from a street railway company to a railroad. Without that construction the argument is meaningless. However, if it is meant that South Shore became a railroad, that conclusion is erroneous for at least one reason, which is that section 2 of the Indiana general corporation act does not permit railroads, as distinguished from street or interurban railways, to be organized thereunder. Railroads are specifically excepted from that act.[16] Therefore, it is clear that South Shore could adopt and continue to exist under that act only as a street or interurban railway. South Shore's status is the same under the general corporation act as it was when that corporation was created under the Indiana law for the formation of street and interurban railways.[17] The validity of the by-law in question is not

16. Burns Indiana Statutes, 25-201.

17. Burns Indiana Statutes, 1926, ed., §§ 13,297 *et seq.*

affected by the fact that South Shore, as a common carrier, engages in interstate commerce in the conduct of its street railway or interurban railway business.

2. Whether or not South Shore should have been restrained by the District Court from using at its annual meeting the proxies secured by the Kissel Organization, is a moot question, the meeting having been held and adjourned.

As to the prayer of the complaint that South Shore be enjoined from paying Kissel Organization for its work in securing the proxies pursuant to an agreement with South Shore, no reason has been assigned by plaintiffs indicating that the agreement is unenforceable for any reason. Whether the proxies were obtained by Kissel Organization by means of an improper use of confidential information, which might make it liable to plaintiffs, is irrelevant because plaintiffs pray for no relief against Kissel Organization. On the record before us no reason appears that indicates it is not entitled to enforce its contract against South Shore for services rendered. Hence it would be improper to enjoin South Shore from performing its obligation under that contract.

For the reasons hereinbefore set forth, the order of the District Court dismissing the action with prejudice is

AFFIRMED.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 615

WILLIAM HENNING RUBIN, *et al.*,

Petitioners,

vs.

CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. Its order dismissing the action appears in the record at page 28. The opinion of the court of appeals (Pet. 44-52) is reported in 217 F. 2d 177.[1]

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on November 24, 1954 (see Pet. 44).

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[1] The word "affirmed" in the opinion below (line 15, Pet. 47) was changed to "reversed" by order of November 30, 1954 (see 217 F. 2d at p. 179 (line 8)).

The petition for a writ of certiorari was filed on February 23, 1955. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code.

QUESTION PRESENTED

Whether the respondent's by-law requiring a majority of its directors to be residents of Indiana is valid.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 11-13.

STATEMENT

The complaint herein was filed on March 22, 1954, by certain Illinois stockholders of the respondent Indiana corporation (R. 3-21). Diversity of citizenship was the asserted basis of jurisdiction (R. 4).

The complaint alleges that the 1930 by-law of the respondent which requires a majority of its directors to be residents of Indiana is invalid. It is claimed that the by-law is not sanctioned by the Indiana General Corporation Act, and that the Indiana Public Service Corporation Act, which requires such a by-law, is inapplicable. Accordingly, the petitioners assert that the by-law is void. (R. 4.21.)

In addition to the complaint seeking a declaration that this by-law is invalid, on March 23, 1954, the petitioners filed a motion for preliminary injunction asking that respondent's annual meeting be postponed until petitioners received responses to their second, annual proxy solicitation of respondent's stockholders (R. 22-23, 16-18).

On the same day that the motion for preliminary injunction was filed, there was a hearing before the district court

at which the validity of the assailed by-law was argued at length (R. 3). At the conclusion of the hearing, the district court entered an order postponing the respondent's annual meeting, so that petitioners would have time to receive a response to their proxy solicitation (R. 24). The court indicated that petitioners were entitled to no further relief (R. 25).

On April 12, 1954, the respondent filed a motion to dismiss which disclosed that the annual meeting, postponed in accordance with the aforesaid order, had taken place. No lawsuit was filed in Illinois or Indiana attacking the conduct of the annual meeting. The principal ground of the motion to dismiss was that the by-law in question is valid under the Indiana General Corporation Act. Further, it is required by the Indiana Public Service Commission Act. (R. 25-26.)

On April 12, 1954, at the initial hearing on the respondent's motion to dismiss, the petitioners conceded that the validity of the by-law requiring a majority of directors to be Indiana residents was the only remaining point the petitioners were asking the court to decide (R. 27).

Subsequent to the April 12 hearing, briefs were filed by both sides with relation to respondent's motion to dismiss, and a full hearing was held on that motion on June 4, 1954 (R. 3). At the hearing, the district court concluded that the by-law in question is authorized by the Indiana General Corporation Act, that it is required by Section 12 of Chapter 2 of the Indiana Public Service Commission Act and, in addition, that it is valid under general principles of corporation law. Accordingly, at the conclusion of the June 4 hearing, it entered an order dismissing the action (R. 28). The court of appeals affirmed (Pet. 44-52).

ARGUMENT

This case presents no question of federal law and there is no conflict of decisions. The sole issue before the Court is whether the respondent's 1930 by-law requiring that "A majority of the Directors shall be residents of the State of Indiana" (R. 12) is valid. Throughout the petition it is stated that the question at issue is a question of fact requiring further hearings. In truth, the question is one of state law. If the concededly applicable Indiana General Corporation Act authorizes the by-law or if the Indiana Public Service Commission Act applies to the respondent, the by-law is unquestionably valid.

1. The assailed by-law is valid under the Indiana General Corporation Act. In 1929, pursuant to Section 46 thereof (Pet. 11-12), the respondent adopted the Indiana General Corporation Act and now exists thereunder (R. 5). Section 7 of that Act (Appendix, *infra*, p. 11) vests the power to make by-laws in the board of directors of a corporation unless the articles of incorporation provide otherwise, and it is undisputed that respondent's articles do not. Section 9 of the Act (Appendix, *infra*, pp. 11-12) authorizes the residence qualifications embodied in the by-law, for Section 9 provides that "Directors * * * shall have other qualifications as the by-laws prescribe." Obviously, therefore, the by-law is authorized by the Indiana General Corporation Act.

2. In addition, the by-law is required by Section 12, Chapter 2 of the Indiana Public Service Commission Act. The by-law was adopted in conformity with that statutory provision, which states (Appendix, *infra*, p. 13):

> "A majority in number of the board of directors of each and every company or association organized under the laws of the State of Indiana and coming under the provisions of this Act, shall be bona fide residents and citizens of the State of Indiana while acting as such directors."

This statutory provision is mandatory and applies to every company coming under the provisions of the Indiana Public Service Commission Act. The respondent is subject to that Act by virtue of the definitions of "public utility" and "utility" contained in Section 5 thereof (Appendix, *infra*, p. 12). Those definitions include every "street railway or interurban railway" (*idem*). The respondent's articles of incorporation make it plain that it is within said definitions, for Article 11(b) provides that respondent's corporate purpose is "to maintain and operate * * * street railroad, interurban street railroad and suburban street railroad lines and systems * * *" (Pet. 50). The respondent is operating pursuant to indeterminate permits granted under the Indiana Public Service Commission Act. See 214 I.C.C. 167, 169.[2]

Petitioners have argued that the Indiana Public Service Commission Act does not apply to the respondent because it has accepted and is organized under the Indiana General Corporation Act (Pet. 12-13, 19, 34). However, the very fact that the respondent is now organized under the Indiana General Corporation Act shows that it is a street or interurban railway according to Indiana law, for Section 2 of the Indiana General Corporation Act (Appendix, *infra*, p. 11) does not permit railroads, as distinguished from street or interurban railways, to be organized thereunder. Thus, since railroads are expressly prohibited from organizing or doing business under the Indiana General Corporation Act, it is clear that the respondent could adopt, and continue to exist under, the Indiana General Corporation Act only as a street or interurban railway. Moreover, pursuant to Section 18 of the Indiana General Corporation Act (Appendix, *infra*, p. 12), the Indiana Secretary of State has approved the respondent's incorporation under that Act (Pet. 27, 38). Respondent's status, therefore, is

[2] This report of the Interstate Commerce Commission comprises Exhibit A to the complaint (see Pet. 18)

precisely the same now under the Indiana General Corporation Act as when it was originally incorporated under the 1861 special Indiana law for the formation of street and interurban railways. (Sections 13,297 *et seq.*, Burns Ind. Stat., 1926 Ed.) For the purposes of Indiana law, respondent is unquestionably an interurban railway and is subject to Indiana statutory requirements applicable to such companies, including the requirement of the Indiana Public Service Commission Act that a majority of its directors be residents of Indiana. None of the cases cited by petitioners even suggests the contrary.

It is immaterial that respondent is treated as a common carrier engaged in interstate commerce for the purpose of several federal statutes, on the ground that it is an interurban railway which derives more than fifty percent of its revenues from transportation of freight. No federal statute relieves respondent from complying with Indiana law respecting the qualification of directors of a corporation organized and conducting business as an interurban railway under the laws of Indiana. In an effort to persuade this Court to grant certiorari, the petitioners state that the respondent should not be permitted to "relitigate" the question whether it is a common carrier engaged in interstate commerce and accordingly subject to certain provisions in federal statutes (Pet. 33). But the respondent concedes that it is a common carrier in interstate commerce within the purview of such provisions; it is not seeking to relitigate that question.

The opinion in *Chicago, South Shore and South Bend Railroad* v. *Fleming*, 109 F. 2d 419 (C.A. 7, 1940), supporting the determination of the Interstate Commerce Commission that the respondent is subject to the Railway Labor Act, has no bearing on the question of the validity of the by-law. In the proceedings before the Interstate Commerce Commission, there was no denial that the respondent

is validly incorporated under the laws of the State of Indiana as a street and interurban railway and operates under franchises and indeterminate permits for street, interurban and suburban railways. The report of the Interstate Commerce Commission shows that the respondent's "Articles of Reorganization, like the original Articles, authorized the operation of street, interurban or suburban lines" (214 I.C.C. 167, 169[3]); they still do (Pet. 50; cf. Pet. 11, 21, 22). "The original franchises to use the streets in various cities and towns for a street and interurban railway were surrendered in 1922 for an indeterminate permit under the Public Service Commission Law of Indiana" (214 I.C.C. 167, 169).

The estoppel cases relied upon by petitioners (Pet. 29) are inapplicable because respondent has consistently maintained that, under Indiana law, it is incorporated as an interurban or street railway pursuant to the Indiana General Corporation Act and is subject to regulation under the Indiana Public Service Commission Act (cf. Pet. 18). This position has never been abandoned and respondent has faithfully complied with both statutes (cf. Pet. 13, 22). Petitioners rely on respondent's 1944 application for authority to issue securities under Section 20a of the Interstate Commerce Act (Pet. 20, 35-43). However, that application shows that the respondent was acting pursuant to Sections 23 and 29 of the Indiana General Corporation Act (Pet. 20, 40-41) and that respondent then too considered itself as an interurban or street railway, for the Indiana General Corporation Act does not apply to railroads (see Section 2 thereof, Appendix, *infra*, p. 11). Respondent could not by a course of conduct lift itself by its bootstraps and assume a corporate status prohibited by the law to which it owes its existence. Petitioners simply refuse to recognize that the validity of this by-law depends on In-

[3] See note 2, *supra*.

diana law, and that under Indiana law the by-law is not only valid but required.

Petitioners observe that respondent did not comply with the procedure prescribed by the Indiana Public Service Commission Act for the issuance of stock (Pet. 19-20), but that is because under the Interstate Commerce Act the respondent is considered a common carrier in interstate commerce subject to the stock issuance requirements of that Act, which expressly provides that in such circumstances the Interstate Commerce Commission's jurisdiction is "exclusive and plenary" and that a carrier need not obtain other approval for the issuance of securities (49 USC 20a(7)). No provision of the Interstate Commerce Act relieves respondent from complying with the requirement of the Indiana Public Service Commission Act as to the residence of its directors.

Petitioners' statement that "it is impossible for minority shareholders to elect a representative board, a majority of whom are residents of the State of Indiana" (Pet. 33) is belied by petitioners' own slate of directors, a majority of whom were from Indiana (see R. 25). There is no requirement in the Indiana General Corporation Act, the Indiana Public Service Commission Act or in the respondent's charter or by-laws that directors must also be shareholders (cf. Pet. 33). Petitioners' assertion that Indiana railroads are not required to elect directors, a majority of whom are residents of Indiana (see Pet. 33), is irrelevant. The point is that every interurban or street railway incorporated in Indiana must observe such a requirement of the Indiana Public Service Commission Act. Corporations organized and operating in Indiana as railroads, as distinguished from street, interurban or suburban railways, are not subject to the Indiana Public Service Commission Act.

3. The by-law is also valid as a matter of general cor-

porate law. The requirement in the Indiana Public Service Commission Act that a majority of directors of each company subject to that Act shall be residents of Indiana evidences that this by-law comports with the public policy of Indiana. It is well settled that directors' qualifications prescribed in by-laws are valid unless they conflict with the charter, a statute, or public policy of the state of incorporation (2 Fletcher, Cyclopedia on Corporations, § 298). No such conflict exists here. There is nothing extraordinary about the requirement contained in this by-law. Several states require a prescribed number of directors to be residents of the state (2 Fletcher, *op. cit.*, § 307). For example, a provision of the Illinois Constitution (Art. XI, § 11) requires a majority of the directors of a railroad to be residents of Illinois. Section 33 of the Model Business Corporation Act, prepared by the Committee on Corporate Laws of the American Bar Association and published in 1953 by the American Law Institute, requires directors to be residents if the articles or by-laws so provide. That provision has already been enacted in Wisconsin and Oregon, and a similar provision has been enacted in the District of Columbia, based on the 1947 draft of the Model Business Corporation Act.[4] Thus it is apparent that the by-law is in harmony with the public policy of Indiana and Illinois, where the respondent is doing business, and with the most recent expressions of sound public policy by leading experts on corporation law and the Congress of the United States.

4. Petitioners now complain that the Kissel proxy-soliciting firm "was using confidential information obtained" from petitioners (Pet. 29-31; see also Pet. 3). This point could not be advanced in the court below or here because in the district court petitioners waived all questions

[4] 1953 Wis. Stats. § 180.30; 1 Ore. Rev. Stats. § 57.185; Public Law 389, 83d Cong., 2d Sess.

except as to the validity of the by-law (R. 27).[5] Furthermore, this charge is against the Kissel organization, a New York partnership (R. 4), which was not made a party.[6] The petitioners themselves have acknowledged that "Proxy solicitors are a dime a dozen and it is a question of who pays the highest price" (Appendix B to respondent's brief below). They have cited no pertinent SEC rule or judicial decision in their favor. The decisions contained in their petition (pp. 29-31) either involve the professional ethics of attorneys or are cases in which agents or employees violated their existing agency or employment. Finally, as the court below acknowledged, this question is moot (Pet. 52).

CONCLUSION

Since this case presents no question of federal law and there is no conflict of decisions, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] See *Reconstruction Finance Corporation* v. *Goldberg*, 143 F. 2d 752, 759 (C.A. 7, 1944), certiorari denied, 323 U. S. 770; *Aetna Life Insurance Co.* v. *Carillo*, 164 F. 2d 883, 884 (C.A. 5, 1947); *Ark-Tenn Distributing Corporation* v. *Breidt*, 209 F. 2d 359, 360-361 (C.A. 3, 1954); 4 Corpus Juris Secundum, pp. 430-434, 491; 3 Am. Jur. "Appeal and Error," pp. 423-424.

[6] The only defendants served were the South Shore and Jay Samuel Hartt, its president and a resident of Illinois. When the defendants informed the district court that Mr. Hartt's presence defeated diversity jurisdiction, the plaintiffs dismissed him (see R. 2).

APPENDIX

Article IV, Section 1, of respondent's by-laws provides (R. 12):

> "A majority of the Directors shall be residents of the State of Indiana."

Article 2(b) of respondent's articles of incorporation, as amended in 1944, provides in pertinent part that respondent's corporate purpose is (Pet. 50):

> "To maintain and operate, and to that end to construct, purchase, lease or otherwise acquire, own and control street railroad, interurban street railroad and suburban street railroad lines and systems, * * *."

Section 2 of the Indiana General Corporation Act provides:

> "*Corporations may be organized* for pecuniary profit *under this act* for any lawful business purpose or purposes, *except* rural loan and savings associations, credit unions or corporations for the conduct of a banking, *railroad,* insurance, surety, trust, safe deposit, mortgage guaranty or building and loan business." (Burns 25-201.) (Emphasis supplied.)

Section 7 of the Indiana General Corporation Act provides in pertinent part:

> "The power to make, alter, amend or repeal the by-laws of a corporation shall be vested in the board of directors, unless otherwise provided in the articles of incorporation. * * *" (Burns 25-206.)

Section 9 of the Indiana General Corporation Act provides in pertinent part:

> "The business of every corporation shall be managed

by a board of directors, at least a majority of whom are citizens of the United States. *Directors* need not be shareholders in the corporation unless the articles of incorporation or by-laws so require, *but shall have other qualifications as the by-laws prescribe.* * * *." (Burns 25-208.) (Emphasis supplied.)

Section 18 of the Indiana General Corporation Act provides:

> "Upon the presentation of the articles of incorporation, if the secretary of state finds that they conform to law, he shall indorse his approval upon the triplicate copies of the articles, and, when all fees have been paid as required by law, shall file one copy of the articles in his office and issue a certificate of incorporation to the incorporators. The certificate of incorporation, together with two copies of the articles bearing the indorsement of his approval, shall be returned by him to the incorporators or their representatives." (Burns 25-217.)

Section 5, ch. 1, of the Indiana Public Service Commission Act provides in pertinent part:

> "The term '*public utility*' as used in this act *shall mean* and embrace every corporation, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control *any street railway or interurban railway* or any plant or equipment within the state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to or for the public, but said term shall not include a municipality that may now or hereafter acquire, own, or operate any of the foregoing facilities.
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> * * * * *

> *"The term 'utility' as used in this act shall mean every street railway or interurban railway,* and every plant or equipment within the state used for the conveyance of telegraph and telephone messages, or for the production, transmission, delivery, or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service, either directly or indirectly to the public: * * *" (Burns 54-105.) (Emphasis supplied.)

Section 12, ch. 2, of the Indiana Public Service Commission Act provides in pertinent part:

> "* * * A majority in number of the board of directors of each and every company or association organized under the laws of the state of Indiana and coming under the provisions of this act, shall be bona fide residents and citizens of the state of Indiana while acting as such directors." (Burns 54-212.)